



## **BEFORE THE MONTGOMERY COUNTY ETHICS COMMISSION**

### **Advisory Opinion No. 04-009 (reconsideration)**

Peter Krzyzek,<sup>1</sup> the former Executive Director of the County's Board of Investment Trustees (BIT), asks the Commission to reconsider its denial of his requested waiver to allow him to continue working for Fidelity Investments—a County contractor. In that opinion, the Commission concluded that Mr. Krzyzek significantly participated in a procurement matter involving Fidelity when he recommended that the County and the Board of Investment Trustees renew their contract with Fidelity for deferred compensation services. § 19A-13(b). Thus, Mr. Krzyzek could not work for Fidelity for one year following his termination from County employment, absent a waiver. § 19A-8(c). The Commission denied the requested retroactive waiver.

Mr. Krzyzek asks the Commission to reconsider its advisory opinion. § 19A-6(d). Upon reconsideration, the Commission affirms its earlier advisory opinion.

The Commission's earlier decision is expressly adopted and incorporated into this decision. Mr. Krzyzek argues that he has not violated § 19A-13(b) and, therefore, no waiver is necessary. This assertion is at odds with Mr. Krzyzek original request for a waiver which, as the Commission noted in its advisory opinion, “presumes that his present employment violates the ethics law's limitations upon the employment of former public employees.” Nonetheless, the Commission stated that it would examine that presumption before applying the waiver criteria. The Commission will now do so again.

A few months after Mr. Krzyzek began work for the County as BIT Executive Director, one of his subordinates recommended that the County renew its expired contract with Fidelity to provide deferred compensation services to County employees. That memorandum, dated November 19, 2003, went “through” Mr. Krzyzek, and Mr. Krzyzek signed it. The County renewed its contract with Fidelity on or about January 5, 2004. Mr. Krzyzek left the County at the end of January 2004, although the County maintained him on paid administrative leave until April 27, 2004. Mr. Krzyzek began employment with Fidelity on March 31, 2004, while still on

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<sup>1</sup> The Commission may reveal the identity of a public employee who applies for a waiver that is not granted if it has reasonable cause to believe that the employee has engaged in the conduct for which the waiver was sought. That is the case here.

administrative leave.<sup>2</sup>

Mr. Krzyzek argues that he did not violate § 19A-13(b) because he did not “‘significantly participate’ in regulating Fidelity, nor did he ‘significantly participate’ in the County’s contractual relationship with Fidelity.” Section 19A-13(c) defines the term “significant participation.”

Significant participation means making a decision, approval, disapproval, recommendation, rendering of advice, investigation, or similar action taken as an officer or employee. Significant participation ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.

In his request for reconsideration, the former employee states that he did not recommend that the County renew its contract with Fidelity and that he signed the memorandum “as that was the procedure where a subordinate’s recommendation was channeled through him.” He notes that he did not make the decision to engage Fidelity and did not have authority to unilaterally engage Fidelity. He states that he had very limited contacts with Fidelity’s representatives and that it was his subordinate, not him, who managed the County’s relationship with Fidelity and directed its work. Indeed, Mr. Krzyzek concludes that his position as a County employee was “largely a figure head role,” albeit one within the County’s Management Leadership Service.

The Commission has carefully considered all of the employee’s arguments. But, as before, we conclude that Mr. Krzyzek significantly participated in a procurement matter involving Fidelity because he made a recommendation regarding contractual activity with Fidelity. Notwithstanding Mr. Krzyzek’s attempts to minimize his role in the procurement process, or even as a County employee, we conclude that his conduct falls comfortably within the definition of “significant participation.” Not only did he sign off on the memorandum recommending renewal of the expired contract, the memorandum itself uses the phrases “we recommend” and “we are requesting approval.” Thus, Mr. Krzyzek’s continued employment with Fidelity contractor required a waiver of § 19A-13(b).

Without conceding the need for a waiver, Mr. Krzyzek asserts that the Commission should reconsider its refusal to grant him a waiver. Section 19A-8(c) states that, upon written request, the Commission may waive the prohibitions of § 19A-13 if it finds that (1) failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees or (2) the proposed employment is not likely to create an actual conflict of interest.

Mr. Krzyzek is seeking a waiver retroactive to the date he left the County’s employ. He states that Fidelity terminated his employment effective January 7, 2005, after the Commission issued its Advisory Opinion. Although the prohibition in § 19A-13(b) only extends for one year

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<sup>2</sup> Mr. Krzyzek sought neither approval for secondary employment nor a waiver from the ethics law’s prohibition against secondary employment. § 19A-12.

after termination from the County's employ, we presume that he hopes that Fidelity will rehire him if the Commission grants him a retroactive waiver.

Mr. Krzyzek asserts his employment with Fidelity would not, and has not, created any conflict of interest with the County because he "was not responsible for or involved in any way in maintaining, servicing or otherwise dealing with Fidelity's contract with the County." He also asserts that failure to grant requested waiver "would most certainly discourage other qualified executives from considering employment with the County."

The Commission concludes, as it did before, that there are no facts to support a finding that failure to grant the waiver might reduce the County's ability to hire or retain highly qualified employees. Among a variety of possible options, an employee, for example, might make such a showing by demonstrating that the applicant pool for employees in his position is relatively small and, accordingly, the strict application of the ethics law would negatively impact the County's ability to find qualified employees for that position. Or an employee might demonstrate that the relationship between public and private sector in his particular field is so intertwined that he would be hard pressed to find post-County employment with an employer that he did not significantly participate in either (1) regulating or (2) procurement activity. Mr. Krzyzek has not made any such showing in this case. There is simply no evidence that the County's recruitment or retention of employees in Mr. Krzyzek's former position is diminished if the Commission does not grant the requested waiver.

Neither are we persuaded that Mr. Krzyzek's "proposed employment" with Fidelity is unlikely to create an actual conflict of interest, to the extent that standard is even applicable to one who seeks a waiver of past conduct. The conflict under § 19A-13(b) arises because of the possibility that a contractor will offer employment to an employee in exchange for a favorable recommendation (or action) in a procurement matter. The conflict issue does not rest upon the nature of the former employee's proposed employment with the County contractor, after leaving the County's employ. Thus, the conflict is not averted if the former employee is not responsible for or involved in any way in maintaining, servicing or otherwise dealing with the contractor's contract with the County. The conflict arises because of the former employee's actions while a County employee.

We decline to issue the requested waiver.

February 22, 2005

FOR THE COMMISSION:

A handwritten signature in black ink, appearing to read "Elizabeth K. Kellar".

Elizabeth K. Kellar, Chair